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No. 562

In the Supreme Court of the United States

OCTOBER TERM, 1936

UNITED STATES OF AMERICA, PETITIONER

v.

HARRY J. MADIGAN

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

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v.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the United States, prays that a writ of certiorari be issued to review the judgment of the United States Circuit Court of Appeals for the Ninth Circuit entered in the above entitled case September 8, 1936.

OPINIONS BELOW

The District Court for the Southern District of California rendered no opinion. The opinion of the Circuit Court of Appeals is reported in 85 F. (2d) 609.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered September 8, 1936. The jurisdiction

of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether an insured who converted his insurance from a yearly renewable (war risk) term contract to a United States Government life insurance policy and later suffered a total permanent disability is entitled under Sections 305 and 307 of the World War Veterans' Act, 1924, as amended, to recover disability benefits under the yearly renewable term contract together with all premiums paid under the converted contract.

STATUTES INVOLVED

Section 305 of the World War Veterans' Act, 1924, as amended July 2, 1926, c. 723, 44 Stat. 799, 800 (U. S. C., Title 38, Sec. 516) provides, so far as pertinent, as follows:

> Where any person has heretofore allowed his insurance to lapse, or has canceled or reduced all or any part of such insurance, while suffering from a compensable disability for which compensation was not collected and dies or has died, or becomes or has become permanently and totally disabled and at the time of such death or permanent total disability was or is entitled to compensation remaining uncollected, then and in that event so much of his insurance as said

> uncollected compensation, computed in all cases at the rate provided by section 302 of the War Risk Insurance Act as amended December 24, 1919, would purchase if applied as premiums when due, shall not be considered as lapsed, canceled or reduced; and the United States Veterans' Bureau is hereby authorized and directed to pay to said soldier; or his beneficiaries, as the case may be, the amount of said insurance less the unpaid premiums and interest thereon at 5 per centum per annum compounded annually in installments as provided by law: * * *.

Section 307 of the World War Veterans' Act, as amended by the Act of July 3, 1930, c. 849, 46 Stat. 1001, 1002 (U. S. C., Title 38, Sec. 518) provides as follows:

> All contracts or policies of insurance heretofore or hereafter issued, reinstated, or converted shall be incontestable from the date of issuance, reinstatement, or conversion, except for fraud, nonpayment of premiums, or on the ground that the applicant was not a member of the military or naval forces of the United States, and subject to the provisions of section 23: *Provided,* That the insured under such contract or policy may, without prejudicing his rights, elect to make claim to the bureau or to bring suit under section 19 of this Act on any prior contract or policy, and if found entitled thereto, shall, upon surrender of any subsequent contract or policy, be entitled to payments un-

> der the prior contract or policy: *Provided further,* That this section shall be deemed to be effective as of April 6, 1917, and applicable from that date to all contracts or policies of insurance.

Congressional Committee Reports and the other statutes mentioned herein are contained in the Appendix, *infra,* pp. 13–16.

STATEMENT

Harry J. Madigan, the respondent, brought this suit in the District Court of the United States for the Southern District of California to recover total permanent disability benefits under a contract of yearly renewable term insurance.

The case was tried before the court without a jury upon an agreed statement of facts stipulating that the plaintiff, while in the military service of the United States between July 15, 1917, and July 25, 1919, applied for and was granted war risk term insurance in the sum of $10,000; that on November 1, 1919, he converted the full amount of such insurance into a twenty-payment life policy of United States Government insurance and paid all premiums due on the latter policy until January 31, 1920, when it was allowed to lapse for nonpayment of further premiums; that he was suffering from a "compensable disability" on the date of the conversion (November 1, 1919) and also at the time when the twenty-payment life policy lapsed (January 31, 1920); that on June 6, 1925, the Veterans' Bureau rated the plaintiff as totally and

permanently disabled, and at that time he was entitled to disability compensation from the Government in the sum of $312.25, no part of which had been paid to him. (R. 9–10.)

The plaintiff sought to recover total permanent disability benefits under the original war risk term contract in preference to the twenty-payment life policy on the theory that under Section 305 of the World War Veterans' Act, 1924, as amended July 2, 1926, *supra,* and Section 307 of that Act, as amended July 3, 1930, *supra,* the insurance was subject to revival under both policies and that he was entitled to elect the one under which total permanent disability benefits should be paid. (R. 19–20.) He elected to claim under the original term insurance contract presumably because of its lower rate of premium which would enable a greater amount of insurance to be revived under it than under the twenty-payment life policy.

The defendant, while conceding that the conditions existed for revival of the converted (twenty-payment life) insurance and that plaintiff was entitled to benefits thereunder, requested the court to rule that the original yearly renewable term insurance was not subject to revival since it had been converted and had not been allowed to lapse or been cancelled or reduced within the meaning of Section 305, World War Veterans' Act, as amended, and thus that there was absent an essential condition to the revival of the term insurance and that Section

307, as amended, had no application. (R. 18–19, 20.)

The trial court made findings of fact in accordance with the stipulation and entered conclusions of law (R. 11–13) and judgment for the plaintiff (R. 13), awarding him total permanent disability benefits based upon a revival of so much of the insurance under the original contract as the amount of compensation ($312.25) remaining uncollected on the date of total permanent disability would have purchased if it had been applied to the payment of all premiums which would have been due under the original contract between the date of conversion and the date of total permanent disability. (R. 14.) Plaintiff was also allowed to recover all premiums which he had paid on the twenty-payment life insurance policy. (R. 15.) The defendant appealed from this judgment to the Circuit Court of Appeals for the Ninth Circuit (R. 24–27), assigning error *inter alia* to the trial court's denial of its request for a ruling that there had been no lapse, cancellation or reduction of the war risk term insurance within the meaning of Section 305, *supra,* (R. 25) and also to the trial court's ruling that the plaintiff had the right to elect to recover insurance benefits under his original policy by virtue of Section 307, *supra,* together with the premiums paid on the second policy (R. 26).

The Circuit Court of Appeals affirmed the judgment of the District Court, but the grounds upon

which it based its decision are not clearly apprehended. As we read the opinion two possible constructions are presented: (a) that Section 305 provides for the revival and payment of yearly renewable term insurance where total permanent disability occurs after conversion of such insurance to United States Government life insurance, or (b) that Section 305 standing alone may not be so construed but was amended by Section 307 to provide for such construction.

SPECIFICATION OF ERRORS TO BE URGED

The Circuit Court of Appeals erred:

1. In holding (a) that under Section 305, World War Veterans' Act, 1924, as amended by the Act of July 2, 1926, yearly renewable term insurance may be matured by total permanent disability occurring after its conversion to a policy of United States Government life insurance, or (b) that Section 307, World War Veterans' Act, as amended by the Act of July 3, 1930, amended Section 305 of the Act to provide for the maturity of yearly renewable term insurance by total permanent disability occurring after its conversion to a policy of United States Government life insurance.

2. In affirming the judgment of the District Court.

REASONS FOR GRANTING THE WRIT

The decision of the Circuit Court of Appeals is directly opposed to the long continued administrative practice of the Veterans Administration and

its predecessor, the Veterans' Bureau, which, according to the letter of the Administrator of Veterans' Affairs (Appendix, *infra*, p. 16), have consistently administered Section 305 of the World War Veterans' Act, 1924, and the earlier provisions for the revival of insurance embodied in Section 408 of the War Risk Insurance Act, *infra*, pp. 14–15, as containing no provisions, express or implied, for the revival of insurance under a yearly renewable term contract after it has been converted to a policy of United States Government life insurance. This practice, moreover, continued without change subsequent to the amendment of Section 307 by the Act of July 3, 1930, which was retroactive in effect.

While the amount involved in the instant case is relatively small, the effect of the decision would be of serious consequence to the Government. The Administrator of Veterans' Affairs states in his letter:

> A recent study of the records in a limited number of adjudicated cases involving converted cases indicates that there have been approximately 300 cases in which the facts were substantially similar to those in the Madigan case, and it is estimated that the insurance benefits payable in those cases, if that decision were followed, would exceed those which have been paid administratively by approximately $1,500,000 in the aggregate. There are now pending before the Veterans' Administration 686 claims

(both death and disability) for converted insurance involving an aggregate amount of approximately $3,500,000.

Moreover, there are at present 4,804 suits on contracts of yearly renewable term and United States Government life insurance pending in the courts, of which 428 involve claims under Section 305.[1]

Furthermore, it is submitted that the decision of the court below is contrary to the plain provisions and purposes of Section 305, *supra,* or involves an interpretation of Section 307, *supra,* apparently at variance with established principles of statutory construction.

Section 305 contains no express provision for the maturity of term insurance subsequent to its conversion. It provides specifically, as a condition precedent to the revival and maturity of insurance, that the insured "has * * * allowed his insurance to lapse, or has canceled or reduced" it. The words "lapse" and "canceled or reduced" used in Section 305 import a discontinuance of the insurance in whole or in part. Conversion implies the precise contrary, a continuance of insurance in a more permanent form. It was discontinuance of insurance, as a result of the nonpayment of compensation, which Section 305 was enacted to prevent. To include conversion by implication would

[1] It is a fair inference from past experience that many additional claims under Section 305 will be presented by amendments to pleadings in cases which do not at present embody them.

be to depart from the purpose of this section to avoid loss of insurance protection by veterans to whom disability compensation was due and unpaid and who, if payment had been made, might have applied such compensation to premiums on the insurance which was permitted to lapse or was cancelled or reduced. (See *United States* v. *Hendrickson,* 53 F. (2d) 797, 799 (C. C. A. 10th); *United States* v. *Sellers,* 75 F. (2d) 623, 625 (C. C. A. 5th), certiorari denied, 295 U. S. 763; and the House Committee Report, Appendix, *infra,* pp. 14–15). Obviously, the conversion of yearly renewable term insurance to a level premium form of United States Government life insurance is not an act attributable to the nonreceipt of compensation since it represents an assumption by the insured of an immediately higher premium obligation, nor does it involve a loss of insurance protection.

We submit that Section 307, as amended by the Act of July 3, 1930, *supra,* was not intended to amend Section 305. Section 307 was amended to permit recovery under a term contract shown to have matured by total permanent disability occurring during its life, despite subsequent conversion (*United States* v. *Arzner,* 287 U. S. 470). Here the total permanent disability occurred after the conversion of insurance at a time when only the converted contract was in force under Section 305. Section 307 was manifestly intended only to permit suit to enforce rights on the prior contract, the assertion of which otherwise would have been

barred, under the decisions of several courts, by estoppel or novation through the execution of the subsequent contract. (*United States* v. *Buzard*, 33 F. (2d) 883 (C. C. A. 9th); *Stevens* v. *United States*, 29 F. (2d) 904 (C. C. A. 8th); *United States* v. *Kusnierz*, 33 F. (2d) 887 (C. C. A. 9th).) Section 307 was not intended otherwise to confer upon the insured rights under the former contract which he did not already possess. No such intent was expressed in the Act, and, it is submitted, none may be implied from its language to provide so radical an extension of the scope of Section 305 beyond its original purpose. Such an interpretation would, indeed, be inconsistent with one of the conditions in Section 307, that the insured be "found entitled" to make claim or bring suit on the "prior contract or policy."

In any event it is submitted that since Congress has expressly stipulated in Section 305 the conditions for revival and maturity of insurance, such express legislation must control in the absence of subsequent legislation equally express, and is not to be overthrown by any mere inferences or implications to be found in Section 307 as subsequently enacted. (*Rosencrans* v. *United States*, 165 U. S. 257, 262.) Furthermore, such implications would be inconsistent with the Senate Committee Report made in connection with the adoption of this amendment, which confirms the interpretation urged by petitioner. (Appendix, *infra*, pp. 15–16).

Recent decisions regarding other phases of Section 305 show a marked tendency to interpret it so as to increase the Government's liability far beyond the limits adopted by long continued administrative practice.[2] Moreover, it has been held in *United States* v. *Weaver* (C. C. A. 4th), decided November 9, 1936, as yet unreported, that benefits provided by Section 305 are vested contractual rights within the protection of the Fifth Amendment and are, therefore, not subject to repeal or impairment. Thus it appears that legislation might be productive merely of increased uncertainty as to rights under this section. Therefore, it would seem that there now exists a manifest need for this Court's consideration of the scope of the section.

For this and for the reasons previously stated, it is respectfully submitted that this application for a writ of certiorari should be granted.

STANLEY REED,
Solicitor General.

DECEMBER 1936.

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[2] In *Skelton* v. *United States* (C. C. A. 10th), decided July 21, 1936, as yet unreported, rehearing granted September 10, 1936, it was held that Section 305 operates to revive term insurance after July 2, 1927, despite the limitation in Section 301 that "All yearly renewable term insurance shall cease on July 2, 1927, except when death or total permanent disability shall have occurred before July 2, 1927 * * *." In *United States* v. *Wilson*, 85 F. (2d) 444 (C. C. A. 9th), it was held that despite the proviso added to Section 305 by the amendment of July 2, 1926, restricting payment of insurance thereafter revived "only" to the insured and specified persons of close relationship, recovery by a personal representative was permissible.

APPENDIX

PERTINENT STATUTES AND COMMITTEE REPORTS

SEC. 400. That in order to give to every commissioned officer and enlisted man and to every member of the Army Nurse Corps (female) and of the Navy Nurse Corps (female) when employed in active service under the War Department or Navy Department greater protection for themselves and their dependents than is provided in Article III, the United States, upon application to the bureau and without medical examination, shall grant insurance against the death or total permanent disability of any such person in any multiple of $500, and not less than $1,000 or more than $10,000, upon the payment of the premiums as hereinafter provided. (Act of October 6, 1917, c. 105, 40 Stat. 409.)

SEC. 404. That during the period of war and thereafter until converted the insurance shall be term insurance for successive terms of one year each. Not later than five years after the date of the termination of the war as declared by proclamation of the President of the United States, the term insurance shall be converted, without medical examination, into such form or forms of insurance as may be prescribed by regulations and as the insured may request. Regulations shall provide for the right to convert into ordinary life, twenty payment life, endowment maturing at age sixty-two and into other usual forms of insurance and shall

prescribe the time and method of payment of the premiums thereon, but payments of premiums in advance shall not be required for periods of more than one month each and may be deducted from the pay or deposit of the insured or be otherwise made at his election. (Act of October 6, 1917, c. 105, 40 Stat. 410.)

SEC. 408. * * * That where any soldier has heretofore allowed his insurance to lapse, while suffering from wounds or disease suffered or contracted in line of service, and was at the time he allowed his said policy to lapse entitled to compensation on account thereof in a sum equal to or in excess of the amount due from him in premiums on his said insurance, and has since died from said wounds or disease without collecting or making claim for said compensation, or being allowed to reinstate his said policy on account of his physical condition, then and in that event said policy shall not be considered as lapsed, and the Veterans' Bureau is hereby authorized and directed to pay to the beneficiaries of said soldier under said policy the amount of said insurance less the premiums and interest thereon at 5 per centum per annum compounded annually in installments as provided by law. (Act of August 9, 1921, c. 57, Sec. 27, 42 Stat. 156.)

In the House Committee Report made in connection with this Act, it is said (H. Rep. No. 104, 67th Cong., 1st Sess., p. 10):

It would appear to be equitable and fair when it is remembered that as a matter of fact in most of the instances the reason the disabled soldier failed to keep up his insurance was that he was short of funds and it took the Government some time to investi-

> gate and grant his compensation, and that because of this financial stringency he allowed his insurance to lapse.

This section was amended by the Act of March 4, 1923, c. 291, Sec. 7, 42 Stat. 1521, 1525–1526, to read as follows:

> SEC. 408. * * * That where any soldier has heretofore allowed his insurance to lapse, while suffering from wounds or disease suffered or contracted in line of service, and was at the time he allowed his insurance to lapse entitled to compensation on account thereof in a sum equal to or in excess of the amount due from him in premiums on his said insurance, and dies or has died from said wounds or disease, or becomes or has become permanently and totally disabled by reason thereof, without collecting said compensation, and at the time of such death or permanent total disability had or has sufficient uncollected compensation to pay all unpaid premiums, then and in that event said policy shall not be considered as lapsed, and the United States Veterans' Bureau is hereby authorized and directed to pay to the said soldier or his beneficiaries under said policy the amount of said insurance less the premiums and interest thereon at 5 per centum per annum compounded annually in installments as provided by law: * * *.

In the Senate Committee Report made in connection with the Act of July 3, 1930, amending Section 307 of the World War Veterans' Act, 1924, it is said (S. Rep. No. 1128, 71st Cong., 2d Sess., p. 10):

> Further provision is made permitting the insured to elect after a reinstatement or conversion to go back to some prior contract and

claim rights thereunder; and if he proves himself entitled to such rights, upon surrender of the latter contract or contracts, to be paid under the prior contract. The purpose is to prohibit the raising of estoppel against the claimant either in or out of the courts because of his reinstatement or conversion of his insurance. * * * Recovery, however, can only be effected upon one of the contracts or policies. The effect of the present practice of the bureau in raising estoppel is to penalize the man who pays his premiums or tries to continue all or a part of his insurance in force.

Letter from the Administrator of Veterans' Affairs to the Solicitor General:

Office of
The Administrator of
Veterans Affairs

VETERANS ADMINISTRATION,
Washington, December 5, 1936.

United States of America *vs.* Harry J. Madigan

The Honorable, The SOLICITOR GENERAL,
Department of Justice,
Washington, D. C.

SIR: I am responding to your letter of December 3, 1936, relative to steps which the Department of Justice proposes to take in the case of United States of America, Appellant, vs. Harry J. Madigan, Appellee, United States Circuit Court of Appeals, Ninth Circuit, No. 8038, wherein you request that you be furnished some estimate of the increased liability under Section 305 revivals, if the rule in the Madigan case should be followed, also a statement of the general administrative policy which the Veterans' Bureau, now the Veterans' Administration, has followed with reference to cases of this type.

The Veterans' Administration and its predecessors have awarded insurance (both term and converted) under Section 305, World War Veterans' Act, and Section 408, War Risk Insurance Act, in more than 12,000 cases. The average amount of term insurance saved from lapse in such cases is approximately $7,000. A review of a portion of these cases reveals that converted insurance is involved in a relatively small proportion of them and that the average amount of converted insurance prevented from lapse is approximately $2,000. A recent study of the records in a limited number of adjudicated cases involving converted cases indicates that there have been approximately 300 cases in which the facts were substantially similar to those in the Madigan case, and it is estimated that the insurance benefits payable in those cases, if that decision were followed, would exceed those which have been paid administratively by approximately $1,500,000 in the aggregate. There are now pending before the Veterans' Administration 686 claims (both death and disability) for converted insurance involving an aggregate amount of approximately $3,500,000.

While the point raised in *United States* v. *Madigan,* 85 F. (2d) 609 (C. C. A. 9th), has not been the subject of a specific formal administrative decision, it has been the consistent practice of the Veterans' Administration and its predecessors to administer Section 305, World War Veterans' Act, 1924, and the preceding provisions of Section 408, War Risk Insurance Act, on the theory that they contained no provisions, express or implied, for revival of insurance under a yearly renewable term contract after it had been converted to a policy of

United States Government life insurance. Moreover, this practice continued without change subsequent to the amendment to Section 307, World War Veterans' Act of the Act of July 3, 1930, the view being held that Congress did not intend by that Act to amend Section 305, World War Veterans' Act.

It thus appears that the decision of the Circuit Court of Appeals for the Ninth Circuit in the *Madigan* case is contrary to the long continued administrative practice.

Although the records of the Veterans' Administration do not permit of an exact estimate of the total additional costs, including those arising in future claims, which would result under the rule laid down in the *Madigan* case, sufficient data is at hand to show conclusively that the additional liability thereby incurred might be substantial.

The question of law involved in the *Madigan* case would, therefore, seem to be important not only because of the desirability of proper statutory construction, but also because it may involve a substantial liability to the Government which, under the indicated practice of this Administration, has not heretofore been considered to exist.

I hope, therefore, that it will be possible to obtain a final determination of the question by the Supreme Court. If the Veterans' Administration may be of any further assistance to your Department, you may be assured that every effort will be made to cooperate.

Respectfully,

/s/ Frank T. Hines

FRANK T. HINES,

Administrator.

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